Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 04-232
Retention by Broadcasters of	)	
Program Recordings	)	

Reply Comments of Western States Public Radio On Behalf of Its Member Public Radio Stations

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Summary of Comments

Western States Public Radio ("WSPR") files these Reply Comments to follow up on the previous comments it filed jointly with Southern States Public Radio and California Public Radio in the above-captioned proceeding. WSPR wishes in these Reply Comments to underscore the lack of support on the record to date for the Commission's proposed rule. Only a handful of individuals, businesses or organizations filed comments in support. Of those that did, many of them revealed either a private profit motive for adopting their position (e.g., recording equipment manufacturers) or a private agenda to use the rule for purposes beyond its stated intent of improving the enforcement of indecency laws.

Under existing FCC and court precedents, the rulemaking record fails to provide sufficient support to justify enactment of a record retention rule. As it is constrained by administrative law standards to do, the Commission should adopt the same approach that it took when similar rules were proposed in *Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records,* Third Report and Order, 64 FCC 2d 1100 (1977). It should close this proceeding without further action.

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Western States Public Radio, on behalf of its member public radio stations located in the Western United States (hereafter, "Western Public Radio" or "WSPR") submits these Reply Comments with respect to the rules proposed by the Federal Communications Commission ("Commission" or "FCC") in the above-captioned proceeding.[1]

Introduction

The Public Radio Regional Organizations (PRROs), including WSPR members, previously filed Comments, in the first round of this rulemaking proceeding, in which they explained the basis for their opposition to the proposed rules on constitutional, practical, and administrative law grounds. WSPR has reviewed the comments filed by other parties, both in favor of and opposed to the proposed rules. From this review, WSPR can only conclude that the record is quite clear: insufficient support exists in this rulemaking record to provide the basis for any further action on the proposed rules. Furthermore, the warnings that the PRROs and others raised during that first round regarding the constitutional and practical risks inherent in the proposed rule have now been confirmed. For these reasons, as the Commission realized *sua*

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[1] *Retention by Broadcasters of Program Recordings, Notice of Proposed Rulemaking,* MM Docket No. 04-232, released July 7, 2004 (hereafter, "*NPRM*")..

sponte 27 years ago in *Petition for Rulemaking to Require Broadcast Licensees to Maintain Certain Program Records,*[2] this NPRM should be withdrawn without further action and this proceeding closed.

WSPR explored the similarities between the currently-proposed rule and the rule proposed in *Certain Program Records* at some length in their initial Comments and concluded that the earlier proceeding provided a compelling precedent for the above-captioned matter.[3] The initial round of comments having now been filed, those similarities are demonstrably stronger. As a basic matter of administrative law, agencies must "provide a consistent approach," and act on rulemaking petitions "in a consistent manner."[4] As WSPR will demonstrate in these Reply Comments, the Commission's only justifiable option, as a matter of administrative as well as constitutional law, is to close this proceeding without further action, as it did in 1977.

I. Under the Commission's Own Precedent in *Certain Program Records,* This Rulemaking Cannot Be Supported or Justified.

In *Certain Program Records,* the Commission decided not to implement a proposal put forward by several "public interest groups" to require all broadcast stations, commercial and NCE, "to make and retain for disclosure transcript, tapes or other recordings of all news and public affairs programming." The stated reason for the proposal had been to assist the Commission (and members of those groups) in enforcement of Commission rules regarding "personal attack, program length commercials, program imbalance or improprieties, . . . [as well as] alleged fairness doctrine and equal time violations or assertions of misleading advertisements,

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[2] Third Report and Order, 64 FCC 2d 1100 (1977) (hereafter, "*Certain Program Records.*"

[3] *See* Comments of Western States Public Radio, Southern Public Radio, and California Public Radio On Behalf of Their Member Public Radio Stations, pp, 12 - 15.

[4] *Airmark Corp. v. FAA,* 758 F. 2d 685, 691 - 95 (D.C. Cir. 1985).

misrepresentations or failure on the part of broadcasters to meet their communities' needs." The ability to monitor compliance with children's programming requirements was also cited as a reason for the proposed rule.[5] Following its review of public comments filed in that proceeding, however, the Commission determined that based on the record before it, it should not implement the staff's proposal because "[w]e simply are not convinced that the public benefits outweigh the costs imposed." The Commission specifically found that:

> [t]he level of interest of the public in such recordings and the level of government need for them do not appear to justify the costs imposed on broadcasters. Opinions may vary as to the amount of those costs, but there is no doubt that production, retention, retrieval and playback of the recordings would cause almost every station to expend money which is now available for public service programming or other purposes." [6]

The Commission expressed particular concern that "the burden would fall in a disproportionately heavy manner on very small stations . . "[7]. The Commission noted commenting parties' concerns regarding the potential "chilling effect" of the proposed rules on first amendment rights, but did not find it necessary to reach the constitutional issue; rather, the Commission based its decision to reject the proposed rule on the financial and administrative

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[5] *Certain Program Records*, 64 FCC 2d at 1110.

[6] *Id.*, at 1113.

[7] *Id.*, at 1113 - 14.

burden the rule would impose upon broadcasters, as well as the low level of support for the rule on the record before it.[8]

WSPR suggests that the rulemaking record in the present proceeding presents the same lack of public interest, the same low level of need, the same cost-benefit analysis regarding costs of recording and retention, the same disproportionate risk for small and NCE stations, and the same constitutional infirmities that caused the Commission to reject the proposed rule in this earlier proceeding.

A. The Low Level of Interest by the Public Does Not Justify the Rule. Despite the Commission's professed concern[9] for citizens whose ability to complain successfully against an allegedly indecent broadcast might be compromised or frustrated without the proposed rule, the NPRM has not resulted in any sort of outpouring of citizen support. On the contrary, the comments of very few parties support the proposed rule and only a handful of individuals even bothered to file comments in support of the proposal. In fact, the number of citizen comments in favor of the proposed rule appears no greater than the number of citizen complaints opposed to it.[10] While one might expect broadcasters, their business and trade associations, and their attorneys to file comments opposed to the rules, one might also have expected – given the

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[8] *Id.*

[9] See, *e,g.,* Statement of Commissioner Michael Copps, NPRM at 11.

[10]One citizen comment expressed concern about "the installment of so many censorship laws." The commenting party (who seems to have paid attention during his middle school Civics classes) stated his opinion that the proposal would violate first amendment rights, and concludes with this plea:

> I am 13 years old, and I do not want the country left to me to lose the rights and freedoms that America treasures. Please consider my complaint and include the input of the common citizen. Thank you. (Comments of Abraham Cohen).

Commission's claims about the alleged need for these rules – a certain groundswell of support from members of groups that, supposedly, are concerned about obscenity and indecency in broadcasting. In *Certain Public Records,* one of the reasons the Commission rejected the proposed rule was the low "level of interest of the public in such recordings." The same low level of interest is obvious on the rulemaking record here.

If, as the Commission seems to believe, the burden were too great for a complainant to produce a significant excerpt, tape, or transcript of allegedly offending programs, WSPR can only wonder at the lack of comments from, for example, the 530,828 people who allegedly filed complaints regarding the Super Bowl half-time show, following an email alert by the Parents' Television Council. Where, for that matter, were the comments of the Parents Television Council – which takes credit that its members filed at least one-quarter of those complaints?

The fact is that few individuals or groups, even those groups one might expect to favor on the proposal, actually filed comments in support of the proposed rule. It appears that only one anti-indecency interest group – Morality in Media -- even bothered to file comments. Significantly, religious broadcasters, who understandably consider themselves unlikely to come even close to violating indecency standards, almost uniformly oppose the proposed record-retention rules.[11] Those few parties who did file comments in favor of the proposed rule tend to fall within one of the following two categories:

1. *Persons in favor of using the rule to enforce indecency standards.* As noted, not much more than a handful of individual citizens, and only two interest groups (Morality in Media and the U.S. Conference of Catholic Bishops) indicated support for the rule *for the express purpose of enforcing indecency standards.*

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[11]See, *e.g.,* Comments of Paulino Bernal Evangelism, He's Alive Broadcasting Association, WDAC Radio Company, Adventist Radio Broadcasters' Association, and Three Angels Broadcasting Network, Inc., for a representative sampling of religious broadcasters who are opposed to the rules on practical, administrative, and/or constitutional grounds.

The record reveals that very few people seem to care about using this rule to improve the enforcement of those standards.

2.. *Individuals, groups or businesses who support the rule for reasons unrelated to enforcement of indecency standards.* As might be expected, a few parties who stand to benefit, financially or otherwise, if the rules are promulgated filed comments in support of the proposal. This small group includes recording equipment manufacturers, "think-tank" researchers who want to conduct research into archives maintained at broadcasters' expense, and self-appointed media "activists," political interest groups, and watch-dogs (on both the right and left ends of the political spectrum).[12] These groups' reasons for supporting the proposed rule bear no relationship to the Commission's stated reasons for proposing this rule – enforcement of indecency standards. Rather, reading their comments produces its own chilling effect. These groups make no secret of their desire to push this proposal further down the "slippery slope" of unconstitutionality and financial and administrative burden in that their explicit desire is to use any such rule in order to gain access to the recordings themselves and use those recording to "police" broadcasters on a wide variety of issues.

While the NPRM itself did not specifically propose that stations be required to make these recordings available to the public, it is highly significant and, frankly, even more chilling to broadcasters that groups such as the Alliance for Better Campaigns, the Annenberg School, and the Benton Foundation are simply champing at the bit to gain access to extensive archives of

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[12] Only a very few such persons, businesses, or groups in this category filed comments. WSPR found only the following parties that fall within this category: OMT Inc./Intertain Media (an equipment manufacturer); VoiceLog (another equipment manufacturer); J. H. Snider (Senior Research Fellow, New America Foundation, who opens his comments thusly: "Few would dispute that local broadcasters are a primary source of political information for the American public." Clearly, Mr. Snider has other fish to fry than indecency complaints but, as the courts and FCC have recognized, such public affairs programming is at the heart of broadcasters' first amendment rights); and a two-page letter jointly filed by the following organizations: Alliance for Better Campaigns, Benton Foundation, Campaign Legal Center, and Annenberg School for Communication ("We strongly urge the Commission to move forward on a rulemaking that would require broadcasters to maintain an archive of recently aired programming, and to place those recordings in the public file so that they are open for public inspection. We believe that such an action would . . . provide opportunities for citizens, activists, and media scholars to provide the Commission with data on whether stations are meeting the needs of their communities.") This group also ignored the ostensible basis for the proposed rule – enforcement of indecency standards and, in so doing, revealed one of the primary risks of this rule – that it would invite every self-appointed "media watchdog" and "activist" to set up shop with a CD player and a local station's "new public archives."

previously-broadcast programs which broadcasters will be required to maintain, at their own considerable expense, for the benefit of these groups.

Whether such access were to be required directly by FCC rules, or indirectly through state public records laws or discovery in civil litigation, the result would be, as broadcasters' comments have warned, that these groups would comb through a station's recording archives looking for fodder to be used in petitions to deny or complaints to the Commission on a wide variety of subject areas. Every listener who opposes a format change, every disappointed job seeker, every curious competitor, would now have the opportunity, at the station's expense, to nit-pick through months of programming in search of something, *anything*, to support of a complaint or petition to deny. Such a result would add enormously to the paperwork burden on licensees and the FCC staff, not to mention the expense on stations to set up listening or viewing facilities, as well as a sizable vault to hold thousands of hours of recordings – its new public file.

The concerns of WSPR and other broadcasters that such abuses would follow from the proposed rule cannot be dismissed as paranoia or exaggeration; comments such as these provide proof positive that broadcasters' concerns are well-founded. Neither can such comments be tallied as support for the rule as proposed, since either ignore or go far beyond the purpose the Commission claims it wishes to address. Rather, they should be read as very strong evidence of one of the primary reasons why the proposed rules should be rejected – its potential for abuse and unintended consequences.

B. The Low Level of Government Need for Such Recordings Does Not Provide Sufficient Justification for the Proposed Rule. In *Certain Program Records*, the Commission made a finding that "the level of government need for [such recordings] do[es] not appear to justify the costs imposed on broadcasters." The Commission expressed particular concern that

"the burden would fall in a disproportionately heavy manner on very small stations."[13] The same is true here. As WSPR and numerous other broadcast stations and groups pointed out in their comments, the costs will be significant on all stations, and will be particularly difficult for small stations and noncommercial broadcasters, including both public radio and religious stations. As noted by the Rocky Mountain Corporation for Public Broadcasting in its initial comments, "there is a *massive disproportion* between a problem involving 169 denied or dismissed complaints and a remedy penalizing all 17, 958 radio and TV broadcast stations (emphasis in original)." The PRROs raised this same issue in their own initial comments, namely, that no need had been shown for the rule since only about 1.2% of complaints had been dismissed for lack of a tape or transcript. Significantly, numerous small broadcast stations and licensees, including a large number of "mom-and-pop" owned-and-operated facilities and small NCE stations, spoke in specific cash terms, detailing just how much compliance with this rule would most likely cost them and how heavily such expenditures would cut into their respective budgets. Such stations surely qualify as small business entities and small organizations under SBA standards. These stations uniformly say what the FCC said in the *Certain Program Records* proceeding 27 years ago: "there is no doubt that production, retention, retrieval, and

[13] Id at 1113 - 14.

playback of the recordings would cause almost every station to expend money which is now available for public service programming or other purposes."[14]

C. The Concern That the Proposed Rule Might Have a Chilling Effect on Free Speech Cannot Easily Be Dismissed. Although the Commission chose not to reach the constitutional issues in *Certain Program Records,* it recognized that it could not ignore constitutional concerns.[15] As comment after comment in the present proceeding points out , those same concerns are present here and, as in 1977, "cannot easily be dismissed." Rather, the proposed rulemaking proceeding should be dismissed on constitutional grounds as well as administrative and practical grounds. As the PRROs discussed in their initial Comments, the D.C. Circuit, in *Community-Service Broadcasting of Mid-America, Inc., et al., v. FCC,*[16] struck down as unconstitutional a federal statute and FCC rules that required NCE stations to retain recordings of public affairs programming.

II. The Proposed Rule Is Counterproductive to Professed Commission Goals and Policies.

The proposed rule is counterproductive to such Commission goals as maintaining localism and diversity in broadcast ownership. Small stations, mom-and-pop stations, non-profits, government licensees, and religious broadcasters repeatedly stressed in comments in this proceeding that they simply cannot afford to sustain these costs. If the FCC is indeed serious in its concern about undue concentration in media ownership and its quest to preserve localism,

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[14] *Certain Program Records* at 1113.

[15] Id. The heading of this section C is a direct quote from the Commission's reasoning in that proceeding.

[16] 593 F.2d1102 (D.C. Cir. 1978) (hereafter, *"Community-Service Broadcasting").* A number of other commenting parties, notably Cohn and Marks LLP on Behalf of Various Broadcast Licensees, National Public Radio, and the Association of America's Public TV Stations, discussed the implications of this case as precedent for the present proceeding..

why would it pile these burdensome rules and costs on stations that are not even part of the problem? Why would it do so when the "problem" itself is a minuscule 1.2% of all indecency complaints? Why would it do so when the trend of federal government policy since at least the Carter administration has been to reduce paperwork and other regulatory burdens on businesses, including broadcasters? And why do this in the face of clear evidence that self-appointed "public interest" groups are salivating at the prospect of free access to over 17,000 recording archives? As Mr. John W. Barger of San Antonio, Texas, warned:

> Mandatory taping will open the very real possibility of fervid witch hunts as interested parties seek evidence not only of indecency but also of slander, or trademark infringement, or copyright infringement, or political broadcasting violations, or any of a variety of other arguably tortuous *(sic)* conduct. . . . So even if broadcasters are not required by the FCC to provide listening-rooms for public opportunists to sit while . . . listening to tapes, public availability of the recordings is likely to be sought through one forum or another.[17]

The Commission does not have the luxury of dismissing Mr. Barger's concerns as paranoia or puffery – the comments of the Mr. Snider and of the Alliance for Better Campaigns prove that his concerns are all too well-founded.

These same small local stations, commercial and NCE, that would be hardest hit by the proposed rule are the stations that, ironically, are least likely to violate indecency standards. These small stations are sufficiently intimidated by the prospect of increased fines that, even if they wanted to take risks on questionable program content, they are terrified of the consequences of doing so. Thus, the very stations that the Commission claims it wishes to preserve – stations with local ownership and management, stations that produce local programming, stations that have roots in their communities, stations that cannot afford expensive syndicated "shock-jock"

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[17] Comments In Regard to MB-Docket 04-232 By John W. Barger, at p. 2.

programs – are the ones least able to sustain the extra costs of the proposed rules and, thus, most likely to fail financially, or be gobbled up by large broadcasting chains, if regulatory burdens and costs are increased. And if, as a result of the rules, they find themselves nit-picked to death by local or national "activists" trying to prove political points regarding campaign financing or advertising, the burden could be unsustainable.

Conclusion

By the Commission's own standards, the proposed rule lacks sufficient support on the record to justify further proceedings. The overwhelming weight of comments were opposed to the proposed rules, even from those who might have been expected to support them. Furthermore, those few comments in favor of the rules reveal, for the most part, a lack of interest in improving enforcement of indecency standards, coupled with an unhealthy interest in achieving some type of collateral benefit at station licensees' expense. For these reasons, the Commission must follow its own precedent from the *Certain Program Records* decision, in which public comment differed little in content from those in the present proceeding. Due to the lack of support or justification for the proposed rule, the Commission should reject the proposed rule and close this proceeding without further action.

Respectfully submitted,

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